

***VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY***

NORTHERN REGIONAL OFFICE  
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Secretary of Natural Resources

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Thomas A. Faha  
Regional Director

**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO**

**MetroDuct Systems VA LLC**

**FOR**

**MetroDuct Systems Linear Projects in Prince William County, Virginia  
Unpermitted Activity**

**SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code §§ 62.1-44.15, 62.1-44.15:25, and 62.1-44.15:48, between the State Water Control Board and MetroDuct Systems VA LLC, regarding MetroDuct Systems VA LLC linear project work located in Prince William County, Virginia, for the purpose of resolving certain violations of the State Water Control Law and the applicable permit and/or regulations.

**SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Construction activity" means any clearing, grading or excavation resulting in land disturbance of equal to or greater than one acre, or disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
5. "Discharge" means the discharge of a pollutant.
6. "Discharge of a pollutant" means:
  - a. Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
  - b. Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
7. "General Permit Regulation" means the General VPDES Permit for Discharges of Stormwater from Construction Activities, 9 VAC 25-880-1 et seq.
8. "Land disturbance" or "land-disturbing activity" means a man-made change to the land surface that potentially changes its runoff characteristics including clearing, grading, or excavation, except that the term shall not include those exemptions specified in Va. Code § 62.1-44.15:34.
9. "MDS" or "MetroDuct" means MetroDuct Systems VA LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. MDS is a "person" within the meaning of Va. Code § 62.1-44.3.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "NRO" means the Northern Regional Office of DEQ, located in Woodbridge, Virginia.
12. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
13. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." 9 VAC 25-870-10.
14. "Pollution" means "such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present

or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are 'pollution.'" Va. Code § 62.1-44.3.

15. "Registration Statement" means a registration statement for coverage under the State Permit.
16. "Runoff volume" means the volume of water that runs off the site from a prescribed design storm. 9 VAC 25-870-10.
17. "Site" means the set of linear utility construction projects located along University Boulevard, Hornbaker Road, and Nokesville Road, near intersection of Prince William County Parkway (Route 234), Manassas, Virginia, 20109 and 20110 (Prince William County), from which discharges of stormwater associated with construction activity occur.
18. "State Permit" means the General VPDES Permit for Discharges of Stormwater from Construction Activities, No. VAR10, promulgated at 9 VAC 25-880-70, which was issued under the State Water Control Law, the VSMP Regulations, and the General Permit Regulation on July 1, 2019 and which expires on June 30, 2024.
19. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 et seq.) of Title 62.1 of the Va. Code.
20. "State Waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
21. "Stormwater" means precipitation that is discharged across the land surface or through conveyances to one or more waterways and that may include stormwater runoff, snow melt runoff, and surface runoff and drainage. Va. Code § 62.1-44.15:24.
22. "Stormwater management plan" or "SWM plan" means a document or series of documents containing material describing methods for complying with the requirements of a VSMP or the VSMP Regulations. 9 VAC 25-870-10.
23. "SWPPP" means Stormwater Pollution Prevention Plan, which is a document that is prepared in accordance with good engineering practices and that identifies potential sources of pollutants that may reasonably be expected to affect the quality of stormwater discharges. A SWPPP required under a VSMP for construction activities shall identify

and require the implementation of control measures, and shall include, but not be limited to the inclusion of, or the incorporation by reference of an approved erosion and sediment control plan, an approved stormwater management plan, and a pollution prevention plan. 9 VAC 25-870-10.

24. "Virginia Stormwater Management Act" means Article 2.3 (§ 62.1-44.15:24 et seq.) of Chapter 3.1 of Title 62.1 of the Va. Code.
25. "Va. Code" means the Code of Virginia (1950), as amended.
26. "VAC" means the Virginia Administrative Code.
27. "VPDES" means Virginia Pollutant Discharge Elimination System.
28. "VSMP" means the Virginia Stormwater Management Program, which is a program approved by the Soil and Water Conservation Board after September 13, 2011, and until June 30, 2013, or the State Water Control Board on and after June 30, 2013, that has been established by a VSMP authority to manage the quality and quantity of runoff resulting from land-disturbing activities and shall include such items as local ordinances, rules, permit requirements, annual standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, enforcement, where authorized in this article, and evaluation consistent with the requirements of this article and associated regulations. Va. Code § 62.1-44.15:24.
29. "VSMP authority" means an authority approved by the Board after September 13, 2011, to operate a VSMP or, until such approval is given, the Department. An authority may include a locality; state entity, including the Department; federal entity; or for linear projects subject annual standards and specifications in accordance with subsection B of § 62.1-44.15-31, electric, natural gas, and telephone utility companies, interstate and intrastate natural gas pipeline companies, railroad companies, or authorities created pursuant to § 15.2-5102. Va. Code § 62.1-44.15:24.
30. "VSMP Regulations" means the Virginia Stormwater Management Program (VSMP) Regulations, 9 VAC 25-870-10 et seq.

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. MDS is the construction activity operator for the Site located in Prince William County, Virginia.
2. Prince William County is a local VSMP authority approved by the Board to operate a VSMP; however, DEQ is the VSMP authority for the Site because it is a linear utility construction.

3. Receiving waters for stormwater discharges from the Site are located in the Middle Potomac-Anacostia-Occoquan Watershed, and are considered “state waters” under the State Water Control Law.
4. DEQ staff conducted an inspection of Site activities on December 5, 2019, and observed land disturbance from construction in areas subject to stormwater runoff (including open trenching, stockpiling, previously completed boring work, work near stream crossings, and one area of temporary construction vehicle/equipment storage). DEQ estimated approximately 5.33 acres of total land disturbance at the time of inspection based on the field estimates of the length and width of the linear construction.

As described by MDS, the trenching activities generally resulted in disturbed areas approximately 15-20 feet wide, and the work typically entailed trenching the excavation for conduit to be laid underground, followed by any needed stabilization of the conduit in the trench, backfilling the trench with the excavated soil, and seeding and strawing the disturbed area, with all such activities normally occurring within several days at a given location.

5. During the Site inspection on December 5, 2019, DEQ staff observed that MDS’s land disturbing activities were consistent with that of a linear utility construction project and MDS did not have DEQ approval for standards and specification for such work.
  - a. Va. Code § 62.1-44.15.31(A) states: “State entities, including the Department of Transportation, and for linear projects set out in subsection B, electric, natural gas, and telephone utility companies, interstate and intrastate natural gas pipeline companies, and railroad companies shall, and federal entities and authorities created pursuant to § 15.2-5102 may, annually submit a single set of standards and specifications for Department approval that describes how land disturbing activities shall be conducted. Such standards and specifications shall be consistent with the requirements of this article and associated regulations, including the regulations governing the General Virginia Stormwater Management Program (VSMP) Permit for Discharges of Stormwater from Construction Activities and the Erosion and Sediment Control Law (§ 62.1-44.15:51 et seq.) and associated regulations...”
6. During the Site inspection on December 5, 2019, DEQ staff observations documented that discharges of stormwater associated with the construction activities had occurred at the Site. At the time of DEQ’s inspection, MDS had not registered for coverage under the State Permit for discharge of stormwater from construction activities at the Site, and the Board has not issued any other certificate or permit for the discharge of stormwater from construction activities at the Site.
  - a. Va. Code § 62.1-44.5(A) states: “Except in compliance with a certificate or permit issued by the Board or other Entity authorized by the Board to issue a certificate or permit pursuant to this chapter, it shall be unlawful for any person to

... [d]ischarge stormwater into state waters from Municipal Separate Storm Sewer System or land disturbing activities.”

- b. Va. Code § 62.1-44.15:34 states: “A person shall not conduct any land-disturbing activity until he has submitted a permit application to the VSMP authority that includes a state VSMP permit registration statement, if such statement is required, and, after July 1, 2014, a stormwater management plan or an executed agreement in lieu of a stormwater management plan, and has obtained VSMP authority approval to begin land disturbance.”
  - c. Va. Code §§ 62.1-44.15:24 and -44.15:34 define “land-disturbing activity” and describe regulated land-disturbing activities (including exemptions), respectively.
  - d. The VSMP Regulations, at 9 VAC 25-870-310(A), states, “Except in compliance with a state permit issued by the board pursuant to the Virginia Stormwater Management Act, it shall be unlawful for any person to discharge stormwater into state waters from Municipal Separate Storm Sewer Systems or land-disturbing activities.”
  - e. The VPDES Regulations, at 9 VAC 25-31-50, also states, “Except in compliance with a VPDES permit, or another permit, issued by the board or other entity authorized by the board, it shall be unlawful for any person to...[d]ischarge stormwater into state waters from municipal separate storm sewer systems or land disturbing activities.
7. During the DEQ Site inspection on December 5, 2019, DEQ staff documented that no SWPPP had been developed or implemented prior to or during performance of construction activity at the Site.
- a. 9 VAC 25-880-50(B)(16) requires that a SWPPP be prepared in accordance with the requirements of the State Permit prior to submitting the registration statement. 9 VAC 25-870-54 explains the required components of a SWPPP.
8. During the DEQ Site inspection on December 5, 2019, DEQ staff documented that no SWM plan had been developed or implemented prior to or during performance of construction activity at the Site.
- a. 9 VAC 25-870-54(C) states: “A stormwater management plan consistent with the requirements of the Virginia Stormwater Management Act and regulations must be designed and implemented during construction activities. Prior to land disturbance, this plan must be approved by the VSMP authority.”
  - b. Va. Code § 62.1-44.15:34 states: “A person shall not conduct any land-disturbing activity until he has submitted a permit application to the VSMP authority that includes a state VSMP permit registration statement, if such statement is required, and, after July 1, 2014, a stormwater management plan or an executed agreement

in lieu of a stormwater management plan, and has obtained VSMP authority approval to begin land disturbance.”

9. During the DEQ Site inspection on December 5, 2019, DEQ staff documented that MDS did not have an approved erosion and sediment control plan for the construction activity being performed at the Site.
  - a. Va. Code § 62.1-44.15.55 states “Except as provided in § 62.1-44.15.56 for state agency and federal agency land-disturbing activities, no person shall engage in any land disturbing activity until he has submitted to the [Virginia Erosion and Sediment Control Program] VESCP authority an erosion and sediment control plan for the land-disturbing activity and the plan has been reviewed and approved.”
  - b. 9 VAC 25-870-54(B) states: “An erosion and sediment control plan consistent with the requirements of the Virginia Erosion and Sediment Control Law and regulations must be designed and implemented during construction activities. Prior to land disturbance, this plan must be approved by either the [Virginia Erosion and Sediment Control Program] VESCP authority or the department in accordance with the Virginia Erosion and Sediment Control Law and attendant regulations.”
10. During the DEQ Site inspection on December 5, 2019, DEQ staff documented that MDS did not have functional sediment trapping controls installed at the Site.
  - a. 9 VAC 25-840-40(4) states: “Sediment basins and traps, perimeter dikes, sediment barriers and other measures intended to trap sediment shall be constructed as a first step in any land disturbing activity and shall be made functional before upslope land disturbance takes place.”
11. Based on the results of DEQ’s Site inspection and file review as summarized above in Sections C(4) through C(10), a Notice of Violation (NOV No. SW2019-12-NRO-0003) was issued to MDS on December 10, 2019.
12. DEQ conducted a follow-up inspection of the Site on December 13, 2020, with representatives of MDS present.
13. On January 17, 2020, DEQ received a written response to the NOV, and on March 5, 2020, DEQ staff met with representatives of MDS to discuss MDS’s NOV response, its progress and further plans for corrective actions, and enforcement proceedings.

MDS agreed to develop and submit standards and specifications to DEQ for approval, and explained that the project work inspected by DEQ and subject to enforcement was actually several separate smaller projects at various development stages. MDS requested instruction from DEQ as to what was necessary to resolve the noncompliance for E&S control plans, SWM plans, and coverage under the State Permit. MDS also noted that the

installation of significant sediment traps or basins was not feasible for the narrow space of the trenching activity (15-20 feet wide) due to the very short time period (several days) during which the trenching activity occurs at a location before permanent stabilization measures (seeding and strawing) are deployed.

14. On April 14, 2020, DEQ stormwater compliance staff received email documentation demonstrating that E&S controls (silt fencing and surface stabilization) had been installed at the Site.
15. DEQ and MDS further corresponded on April 14, April 24, May 8, and May 19, 2020 to discuss corrective actions for the violations. Based on the project information provided by MDS, DEQ requested the submission of a complete application requesting MDS's coverage under the State Permit for the IAD 130 Purple Route project, the only subject project in exceedance of 1 acre of regulated land disturbance, as reported to DEQ by MDS. DEQ also advised MDS that the materials submitted to DEQ by MDS for the IAD 130 Purple Route project on April 14, 2020 did not constitute a SWM plan based on minimum regulatory requirements, and that a complete SWM plan should be submitted to DEQ for review and approval as part of the permit application.
16. DEQ did not request any additional E&S control plans for the project routes already completed, and DEQ and MDS agreed that future E&S control plans will be approved through MDS's standards and specifications, once approved through DEQ.
17. On June 17, 2020, MDS submitted a permit application to DEQ for the IAD 130 Purple Route, inclusive of a registration statement and a SWM plan package as requested by DEQ.
  - a. A corrected application was provided to DEQ the following day to adjust the total disturbed acreage to 4.01 acres.
  - b. On July 28, 2020, DEQ provided formal written review comments to MDS on the SWM plan.
  - c. A revised SWM plan, applying the stormwater management technical criteria set forth in the Virginia Stormwater Management Program Regulations and containing documentation and calculations verifying compliance with the applicable water quality and quantity requirements, was submitted to DEQ for review.
  - d. The SWM plan was approved by DEQ on September 30, 2020.
  - e. Coverage under the State Permit was issued to MDS on November 2, 2020, under Permit Registration No. VAR100781.
  - f. On November 11, 2020, MDS submitted nutrient credit purchase documentation to DEQ.



18. On August 20, 2020, DEQ approved MDS's standards and specifications.
19. Based on the results of the inspections performed on December 5 and 13, 2019, the NOV response submitted to DEQ, the meeting between DEQ and representatives of MDS on March 5, 2020, and related correspondence and documentation between DEQ and representatives of MDS, the Board concludes that MDS violated Va. Code § 62.1-44.15.31(A), Va. Code § 62.1-44.5(A), Va. Code § 62.1-44.15:34, Va. Code § 62.1-44.15.55, 9VAC25-870-310(A), 9VAC25-31-50, 9VAC25-870-50(B)(16), 9VAC25-870-54, 9VAC25-870-54(B), and 9VAC25-870-54(C) as described above.
20. MDS has sufficiently demonstrated a return to compliance by obtaining approval for standards and specifications, obtaining VPDES Permit coverage for stormwater discharges associated with construction activities at the IAD 130 Purple Route project, and previously demonstrated adequate resolution of the other NOV citations, as summarized above in paragraphs C(14) through C(18).

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders MDS, and MDS agrees to pay a civil charge of **\$13,300** within 30 days of the effective date of the Order in settlement of the violations cited in this Order. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

MDS shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, MDS shall be liable for attorneys' fees of 30% of the amount outstanding.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of MDS for good cause shown by MDS, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 et seq., after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. SW2019-12-NRO-0003 dated December 10, 2019. This Order

shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, MDS admits the jurisdictional allegations, and agrees not to contest, but does not admit, the findings of fact and conclusions of law in this Order.
4. MDS consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. MDS declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by MDS to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. MDS shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. MDS shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. MDS shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.


Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and MDS. Nevertheless, MDS agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after MDS has completed all of the requirements of the Order;
  - b. MDS petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to MDS.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve MDS from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by MDS and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of MDS certifies that he or she is a responsible official or officer authorized to enter into the terms and conditions of this Order and to execute and legally bind MDS to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of MDS.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, MDS voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 15<sup>th</sup> day of June, 2021.

  
Thomas A. Faha, Regional Director  
Department of Environmental Quality

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MetroDuct Systems VA LLC voluntarily agrees to the issuance of this Order.

Date: 4/07/2021 By: [Signature], President  
Kenneth E. Katz (Title)  
MetroDuct Systems VA LLC

State of Ohio  
County of Franklin

The foregoing document was signed and acknowledged before me this 7 day of  
April, 2021, by Kenneth E. Katz who is  
President of MetroDuct Systems VA LLC, on behalf of the company.

[Signature]  
Notary Public

Registration No.

My commission expires: N/A



JOSEPH G. BLAKE II  
ATTORNEY AT LAW  
Notary Public, State of Ohio  
My Commission Has No Expiration.  
Section 147.03 R.C.